

*United States Court of Appeals  
for the Second Circuit*



**BRIEF FOR  
APPELLANT**



76-2265

UNITED STATES COURT OF APPEALS  
for the  
SECOND CIRCUIT

76-2265  
Docket No. 76-2265

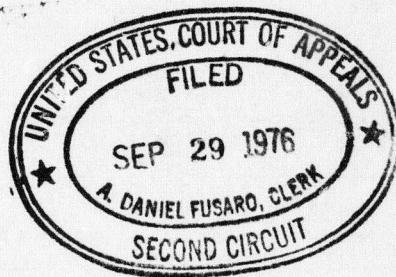
WALTER D. CROMER and ALBERT GRAHAM

Plaintiffs-Appellants

-vs-

MRS. MAURICE T. MOORE, individually and as Chairman of the Board of Trustees of the State University of New York, C. WESLEY MEYTROTT, individually and as Chairman of the Council for Downstate Medical Center, CALVIN H. PLIMPTON, individually and as Vice President for Downstate Medical Center, LEONARD LASTER, individually and as Vice President for Academic and Clinical Affairs of Downstate Medical Center and as Dean of Downstate Medical Center, JEROME P. PARRELL, individually and as Associate Dean of Downstate Medical Center, CHARLES R. GREENE, individually and as Assistant Dean of Downstate Medical Center,

Defendants-Appellees



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BRIEF AND APPENDIX ON BEHALF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES PRESENTED ON APPEAL	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS	3
ARGUMENT	
POINT I PLAINTIFFS' AMENDED COMPLAINT WAS SUFFICIENT AS A MATTER OF LAW. THE MOTION TO DISMISS PURSUANT TO 12(b)(1) SHOULD NOT HAVE BEEN GRANTED.	7
POINT II PLAINTIFFS' AMENDED COMPLAINT WAS SUFFICIENT AS A MATTER OF LAW. A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD HAVE BEEN GRANTED PURSUANT TO 12(b)(6) SHOULD NOT HAVE BEEN GRANTED.	13
CONCLUSION	16

TABLE TO APPENDIX

	Page
Temporary restraining order dated August 29, 1975	A1
Memorandum and Order dated November 5, 1975	A2
Notice of Motion to Dismiss Amended Complaint dated April 14, 1976	A3
Order of Dismissal of Amended Complaint dated May 10, 1976	A4
Complaint	A5
Amended Complaint	A6
Order to Show Cause re Jerome Parnell dated October 31, 1975	A7

ISSUES ON APPEAL

1. Was it an abuse of discretion for the District Court to deny plaintiffs' a full evidentiary hearing on the grounds that their allegations were insufficient under 12(b)(1)?
2. Was it an abuse of discretion for the District Court to deny plaintiffs' a full evidentiary hearing on the grounds that their allegations were insufficient under 12(b)(6)?

### PROCEDURAL HISTORY

Plaintiffs-appellants, Walter D. Cromer and Albert Graham appeal from the dismissal of their Amended Complaint against the defendants-respondents, the faculty and trustees of the Downstate Medical Center College of Medicine.

On August 29, 1975 a temporary restraining order was issued against respondents by the Hon. Henry Bramwell, United States District Court Judge for the Eastern District of New York. [Appendix - A1]. The hearing on the preliminary injunction was held on November 5, 1975 before the Hon. Mark A. Constantino, United States District Court Judge. Judge Constantino denied respondents' motion to dismiss for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1) and failure to state a cause of action, pursuant to Fed. R. Civ. P. 12(b)(6) but dissolved the temporary restraining order. In denying respondents' motion in part and granting it in part, Judge Constantino gave Walter D. Cromer and Albert Graham leave to amend their complaint. [Appendix - A2].

When appellants filed their Amended Complaint, respondents again moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). [Appendix - A3]. On May 10, 1976, the Amended Complaint was dismissed with prejudice, without finding of fact or opinion. [Appendix - A4].

STATEMENT OF FACTS

Walter D. Cromer and Albert Graham were students at the Downstate Medical Center College of Medicine. Cromer attended Downstate from September, 1973 until his registration was cancelled in June, 1975. Graham attended from September, 1972 to June, 1975 when his registration was cancelled. After being continually rebuffed by medical school officials in their efforts to seek administrative relief, Cromer and Graham filed a Complaint in the United States District Court for the Eastern District of New York. They asserted jurisdiction under 28 U.S.C. §1343, alleging that the trustees and officials of Downstate Medical Center College of Medicine violated their right to due process and equal protection under the Fourteenth Amendment of the United States Constitution, and 42 U.S.C. §1981, §1983, and §2000(d) by applying racially motivated academic procedures to themselves and other Black medical students [Appendix - A5].

The Complaint alleged that white medical students with academic problems were given special treatment to insure their success in medical school and that Black medical students were routinely denied this aid. It was further alleged that the Promotions Committee, an ad hoc committee that reviewed the records of students in academic difficulty regularly gave white students the option of taking a leave of absence or being placed in a decelerated academic

program. This option was just as routinely denied to Black students, who were forced to enter the Deceleration Program. Placement in the Deceleration Program meant that a student would be subject to the disdain of the entire medical school community. Cromer and Graham further alleged that white medical students in the Deceleration Program were afforded special treatment. Black medical students had to stipulate that upon receiving one failure or incomplete grade they could be dismissed. White medical students were given two chances. White students were given more opportunities to take make-up examinations than Black students. Blacks were denied course credits even though the grades they received on exams were the same or better than those received by white students [Appendix - A5, paragraphs 3 - 5].

On August 29, 1975 a temporary restraining order was issued commanding defendants to register Walter D. Cromer and Albert Graham and to cease the policy and practice of applying separate and discriminating criteria to Black students. In spite of this order, defendant Jerome P. Parnell, Associate Dean of the Downstate Medical Center failed to register Cromer and Graham [Appendix - A1, A7].

At the hearing on the preliminary injunction, defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(1) was denied. The Hon. Mark A. Constantino, United States District Court Judge, held that under 28 U.S.C. §1343(3), plaintiffs' complaint contained sufficient allegations of state action to meet the threshold requirements for subject matter jurisdiction. [Appendix - A2, 3 - 7].

Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) was denied in part. The Complaint contained sufficient allegations of racial discrimination and arbitrary and capricious conduct to state a cause of action under 42 U.S.C. §1981, §1983 and the Fourteenth Amendment, but the temporary restraining order was dissolved. Judge Constantino did not feel that plaintiffs were likely to succeed in demonstrating that the dismissal was racially motivated and reinstatement pending final resolution on the merits would subject plaintiffs to useless financial expense. [Appendix - A2, 7 - 16].

Plaintiffs were given leave to file an Amended Complaint. The Amended Complaint charged that defendants, under the color of state law used an ad hoc Promotions Committee to determine plaintiffs' fitness to continue in medical school in a manner that violated their constitutional right to procedural and substantive due process under the Fourteenth Amendment, 42 U.S.C. §1981, §1983 and §1988. The complaint further alleged that the Promotions Committee used subjective and grossly exaggerated data in reaching its recommendation to dismiss Cromer and Graham and that no records were kept of the proceeding. As a consequence of these policies, plaintiffs charged that the decision to dismiss them was arbitrary, capricious and in bad faith. Plaintiffs requested that defendants be enjoined from denying them a full and impartial hearing at the medical school and that they be allowed to register pending the outcome of the hearing [Appendix - A6, 1-5].

Defendants moved to dismiss the Amended Complaint on April 19, 1975 pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). On May 10, 1976, without finding of fact or opinion, the Amended Complaint was dismissed, with prejudice.

A R G U M E N T

POINT I

PLAINTIFFS' AMENDED COMPLAINT WAS SUFFICIENT AS A MATTER OF LAW. THE MOTION TO DISMISS PURSUANT TO 12(b)(1) SHOULD NOT HAVE BEEN GRANTED.

Plaintiffs' Amended Complaint invoked the District Court's original jurisdiction under 28 U.S.C.A. §1243(3) which provides:

"The District Court shall have original jurisdiction of any civil action, authorized by law to be commenced by any person; to address the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States, or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Plaintiffs sought to enjoin the defendants, officials of the Downstate Medical Center, from denying them a full and impartial hearing, held by the State University of New York, and to be reinstated pending the outcome of this hearing.

Plaintiffs argue that they were entitled to this proceeding as an equitable remedy under 42 U.S.C.A. §1983, which provides:

"Every person, who under color of any statute, ordinance, regulation, custom or usage or any state or territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In order to deny defendants' motion to dismiss for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1), the Amended Complaint must allege that the defendants acted under color of State law and that their conduct deprived plaintiffs of rights, privileges or immunities secured by law and the Constitution of the United States.

Appellants contend that as a matter of law, the allegations contained in the Amended Complaint were sufficiently stated to meet the aforementioned threshold requirements under §1343(3) and §1983.

The Amended Complaint specifically names the defendants and their official capacities in relation to the Downstate Medical Center:

"Mrs. Maurice T. Moore. . . Board of Trustees of the State University of New York.  
C. Wesley Meytrott . . . Chairman of the Council for Downstate Medical Center.  
Calvin H. Plimpton . . . President of Downstate Medical Center.  
Leonard Lester . . . Dean of Downstate Medical Center College of Medicine and Vice President for Academic and Clinical Affairs of Downstate Medical Center.

Jerome P. Parnell . . . Associate Dean of Downstate Medical Center College of Medicine.  
Charles R. Greene . . . Assistant Dean of Downstate Medical Center College of Medicine." [Appendix - A6 1-2].

In the Preliminary Statement of the Amended Complaint defendants are repeatedly characterized as state officials:

- "10. The plaintiffs charge that the defendants, who are state officials in charge of Downstate Medical Center, violated plaintiffs' substantive and procedural due process rights . . ." [Appendix - A6, 3]
- "13. That the defendant, officials in charge of Downstate Medical Center and/or the Medical College of Downstate Medical Center, a branch of the State University of New York, denied the plaintiffs procedural due process of law . . ." [Appendix A6, 4].
- "14. That the defendants, who are public officials employed by New York State have also violated plaintiffs' substantive due process rights . . ." [Appendix A6, 4].

The mere description of the defendants and their relationship to the State of New York was enough to support the inference that they acted under color of State law. Marshal v. Spangler, 397 F. Supp. 200 (W.D. Va. 1975). The most reasonable inference is that by describing their official capacities, plaintiffs seek to show that by virtue of defendants' offices they acted at the will of the State of New York. Powe v. Miles, 407 F. 2d. 73 (2nd Cir. 1968), Belk v. Chancellor of Washington University, 336 F. Supp. 45 (E.D. Mo. 1970). In Belk the Court stated at page 48:

"It is the opinion of this Court that the acts of a private university can constitute state action when said university is denying to its students the right to participate in the education process. Education is a public function."

The second level of inquiry is whether the Amended Complaint sufficiently alleged the deprivation of a "right, privilege or immunity." The Amended Complaint presented the District Court with a claim that did not lack "substantiality" or Constitutional merit. Brown v. Bronstein, et al, 389 F. Supp. 1328 (So. D. N.Y. 1975). It is well settled that where allegations are made under the Civil Rights Statutes, even though they appear to be insubstantial, the District Court should assume jurisdiction and then decide whether the pleading states a claim for relief Stambler v. Dillon, 302 F. Supp. 1250 (So. D. N.Y. 1969); Escalera v. New York City Housing Authority, 925 F. 2d. 853 (2nd Cir. 1970). Appellants submit that the Amended Complaint alleged the deprivation of a right clearly cognizable under the subject matter jurisdiction of the District Court. In addition to the aforementioned paragraphs of the Amended Complaint, note:

- "12. Plaintiffs allege that the Promotions Committee operated on a purely ad hoc basis without any academic objection standards to determine promotion or cancellations . . . "[Appendix - A6, 3].
- "15. That the defendants violated plaintiffs' substantive due process rights by supplying false and inaccurate academic records of the plaintiffs to the Promotions Committee and

that these inaccurate records operated to the disadvantage of the plaintiffs by exaggerating plaintiffs' academic weaknesses." [Appendix A6, 4].

"16. That the decision to dismiss plaintiffs Cromer and Graham from the College of Medicine was made in bad faith and in an arbitrary and capricious manner." [Appendix A-6, 5].

There is no question that appellants, Walter D. Cromer and Albert Graham have a right under the Fourteenth Amendment to present evidence in support of these allegations. Considerable case law supports the requirement of an evidentiary showing in the District Court where a complaint alleges that an academic dismissal was merely a pretext for arbitrary and capricious state conduct.

Greenhill v. Bailey, 378 F. Supp. 632 (So. D. Iowa 1974) rev'd on other grounds, 519 F. 2d. 5 (8th Cir. 1975), Depperman v. University of Kentucky, 371 F. Supp. 73 (E. D. Ky. 1974), Keys v. Sawyer, 353 F. Supp. 936 (S.D. Tex. 1973), Connelly v. University of Vermont and State Agr. Col., 244 F. Supp. 156 (D. Vt. 1965). Under the rationale of the Greenhill decisions, it is clear the plaintiffs' have alleged violations of substantive due process rights. The allegation that defendants' decisions were made arbitrarily, capriciously and in bad faith entitles plaintiffs-appellants to a hearing on the issues of defendants' "non-academic" motives for dismissing plaintiffs. [See Point II, infra.]

In Connelly v. The University of Vermont and Agr. Col., at page 161, allegations by the plaintiff that a professor stated

that he would not give the plaintiff a passing grade in Pediatric Obstetrics, regardless of his prior work in the Spring and regardless of the quality of his work, were equivalent to an allegation of bad faith, arbitrariness and capriciousness and defeated a motion for summary judgment. See also, Brookins v. Bonnell, 362 F. Supp. 379 (E.D. Pa. 1973):

"Once a student has been formally admitted and satisfactorily completed a full semester of classes, justice would seem to require that the student be afforded a fair opportunity to establish that he has fully met the entrance requirements, or if not, that there existed countervailing considerations. Such as some fault on the part of the college that would preclude dismissal." at p. 384.

POINT II

PLAINTIFFS' AMENDED COMPLAINT WAS SUFFICIENT AS A MATTER OF LAW. A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD HAVE BEEN GRANTED PURSUANT TO 12(b)(6) SHOULD NOT HAVE BEEN GRANTED.

The essence of a Fed. R. Civ. P. 12(b)(6) motion to dismiss is the defendant's contention that the allegations in plaintiff's Amended Complaint if true, do not state the deprivation of a Constitutionally protected interest that the District Court can remedy. When the Fed. R. Civ. P. 12(b)(6) argument is raised, the District Court must construe the Amended Complaint in a light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 23 L. ed. 2d. 404 (1969). Conley v. Gibson, 355 U.S. 41, 2 L. ed 2d. 80 (1957) states:

"A complaint should not be dismissed for failure to state a claim, unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." p. 84.

at p. 85, the court states:

"The Federal Rules of Civil Procedure do not require a claimant to set out, in detail, the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

In addition to the Conley v. Gibson "fair notice" limitation, the

Amended Complaint should not be dismissed because the allegations do not support the legal theory plaintiff intends to pursue. The District Court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. A complaint may not be dismissed on the pleadings because the Court doubts plaintiff will prevail in the action. That is a matter which must be determined on the basis of proof. 5 Wright and Miller, Federal Practice and Procedure - Civil §1357 (1967).

Plaintiffs alleged that the Promotions Committee operated in an arbitrary and capricious manner and in bad faith on a "purely ad hoc basis," [Appendix - A6, p. 3, pp. 12] without any objective standard and "in fact, applied a purely subjective standard" [Appendix - A6, p. 4, pp. 14]. Further, plaintiffs claim "that the records supplied to the Promotions Committee were inaccurate and operated to the disadvantage of the plaintiffs by exaggerating their weaknesses." [Appendix - A6, p. 4, pp. 15]. Certainly the fair inference to be drawn from their allegations is that the scope of the Promotions Committee's investigation was clearly accusatory, rather than quasi-judicial. More importantly, it must be inferred from this language that plaintiffs allege that defendants' decision to dismiss them from medical school was not purely an academic decision. Rather, plaintiffs allege, this was a "bad faith" attempt to use the academic decision making process to dismiss them for other reasons. Such allegations, if supported by clear and convincing evidence would

entitle plaintiffs to relief. Consequently, the allegations alone assert the denial of substantive due process rights, entitling plaintiffs to an evidentiary hearing in the District Court.

Further, plaintiffs' intellectual standing in the medical school community is protected by Fourteenth Amendment procedural due process if the dismissal was based on the use and possible publication of false and exaggerated data. Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d. 570 (1972), Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed. 2d. 548 (1972), Greenhill v. Bailey, 519 F. 2d. (8th Cir. 1975), at page 8:

"We hold that action by the school in denigrating Greenhill's intellectual ability, as distinguished from his performance, deprived him of a significant interest in liberty."

The hearing on the issues of substantive due process may produce evidence which could further clarify and support the procedural process claim. Dixon v. Alabama State Board of Education, 294 F. 2d. 150, 157 (5th Cir. 1961):

"Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded, as was held by the district court, that the power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement. The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is well nigh inevitable when the Board hears only one side of the issue."

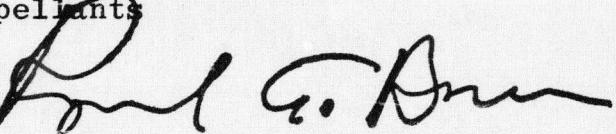
C O N C L U S I O N

For the reasons shown above, it is respectfully submitted that the dismissal of plaintiffs' Amended Complaint should be reversed.

Respectfully submitted,

BROWN & VOGELMAN, ESQS.  
Attorneys for Plaintiffs-  
Appellants

By:

  
RAYMOND A. BROWN

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK-----x  
WALTER D. CROMER AND ALBERT GRAHAM

Plaintiffs,

-against-

ORDER TO SHOW CAUSE

CIVIL ACTION NO.

75 CIV 1418

MRS. MAURICE T. MOORE, individually and as CHAIRMAN OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK: C. WESLEY MEYTROTT, individually, and as CHAIRMAN OF THE COUNCIL FOR DOWNSTATE MEDICAL CENTER; CALVIN H. PLIMPTON, individually, and as PRESIDENT OF DOWNSTATE MEDICAL CENTER: LEONARD LASTER, individually, and as VICE-PRESIDENT FOR ACADEMIC AND CLINICAL AFFAIRS OF DOWNSTATE MEDICAL CENTER and as DEAN OF DOWNSTATE MEDICAL CENTER: JEROME P. PARRELL, individually, and as ASSOCIATE DEAN OF DOWNSTATE MEDICAL CENTER, CHARLES R. GREENS, individually, and as ASSISTANT DEAN OF DOWNSTATE MEDICAL CENTER,

Defendants.

-----x  
Upon the annexed complaint of WALTER D. CROMER and ALBERT GRAHAM, dated the \_\_\_\_ of August, 1975, it is

ORDERED that the defendants or their attorneys shall show cause at the Courthouse located at 225 Cadman Plaza East, Brooklyn, New York, at 10 o'clock in the forenoon on the 8<sup>th</sup> day of September, 1975, why and order should not be made and rendered herein:

(a) Granting a preliminary injunction pursuant to Federal Rule of Civil Procedure Rule 65 commanding defendants, their agents or their servants to restore to the rolls of the Downstate Medical Center, the plaintiffs, WALTER D. CROMER and ALBERT GRAHAM as regularly registered medical students outside the decelerated program and to permit them to register in the courses of the appropriate regular academic sequence for September 1975 at Downstate Medical Center and to attend Downstate Medical Center pending the hearing and determination

of this motion and to cease their policy, practice and custom of applying separate and discriminatory academic criteria to black students at Downstate Medical Center.

(b) Setting a bond at the penal sum of \_\_\_\_\_ for the issuance of said injunction, and

(c) Such other and further relief as this Court deems just and proper under the circumstances, and it is

ORDERED that pending the hearing and determination of this motion, LET temporary restraining order issue commanding the defendants, their agents, or servants to restore plaintiffs to the rolls of Downstate Medical Center, to permit plaintiffs to register for their September 1975 courses ~~outside the decelerated program~~, and to permit plaintiffs to attend these courses. The temporary restraining order is being issued to prevent irreparable harm to the plaintiffs herein due to their having the continuity of their medical studies interrupted through their continued absence from classes which has been caused by the defendants' violation of plaintiffs' constitutional and statutory rights, and it is

FURTHER ORDERED that service of a copy of this order, together upon which the papers for which it is based, be made on or before the 3<sup>rd</sup> day of September, 1975, and such service shall be deemed good service.

DATED: BROOKLYN, NEW YORK

Aug. 29, 1975, 1975

5/5  
Aug. 29, 1975  
\_\_\_\_\_  
U. S. D. J.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
WALTER D. CROMER and ALBERT GRAHAM,

Plaintiffs.

75-C-1418

v.

MRS. MAURICE T. MOORE, individually  
and as Chairman of the Board of  
Trustees of the State University of  
New York, et al.,

MEMORANDUM  
and ORDER

NOV 5 1975

Defendants.

-----X

COSTANTINO, D.J.

Plaintiffs are two black students at Downstate Medical Center School of Medicine (DMC) who allege that their registrations were cancelled as a result of racial discrimination. Plaintiff Walter Cromer entered DMC in September 1973. He failed the three courses he took in his first semester, at which point he was placed in the decelerated program. The decelerated program (now discontinued) was a part-time program designed to lessen the course-load for failing students. School authorities characterize it as an attempt to "salvage their future in medical school." Plaintiffs characterize it as "the conduit through which most black students . . . [were] shunted from

the rolls." Among the more important features of the decelerated program was a one-to-one tutorial program in two of the first semester courses. Examinations were given in these two courses in June, and students who passed those examinations were permitted to re-take the remaining first semester courses and proceed with the courses normally taken during the second semester.

Mr. Cromer indicated that he did not wish to enter the decelerated program, but was told that his only alternatives were to enter the program or leave school. His request for a leave of absence was denied.

In the decelerated program, Cromer failed Histology, received an incomplete in Biochemistry, and passed Environmental Medicine. Because of personal problems Cromer was allowed to repeat all the courses of the first year in the academic year 1974-75. He failed to take the final examinations in Gross Anatomy, Biochemistry, Histology and Neuroscience and thus received incomplete in all those courses. In June of 1975, the Promotions Committee gave Cromer an opportunity to make up his incompletes. The first make-up exam was in Neuroscience, which he failed.

Thereupon Cromer's registration was cancelled.

Plaintiff Albert Graham entered DMC in 1972. In his first semester he failed at least two courses and was therefore placed in the decelerated program. He successfully passed Histology and Biochemistry that semester, and in the academic year 1973-74 passed Gross Anatomy, had an incomplete in Neuroscience, failed Physiology, and in June failed the make-up exam in Neuroscience after his request for a 2 day postponement was denied. In the summer he was re-examined in Neuroscience and again failed. Although in August 1974 his registration was cancelled, after appeal to the Dean he was reinstated upon certain conditions. He was given the opportunity to make up Neuroscience and Physiology. He failed both and in June 1975, his registration was cancelled.

Plaintiffs claim that at various stages they were denied the same opportunities that white students were afforded. They allege among other things that leaves of absence for white students were more freely granted and that harsher and less flexible grading procedures were utilized for black than for white students. Furthermore, plaintiffs

claim that the decelerated program did not assist black students, but rather that it served as a means for dropping black students from DMC. It is plaintiffs' contention that "only one token white student has been placed by the Promotions Committee in the Decelerated Program in spite of the fact that many white students have had similar or identical problems to the plaintiffs at bar."

On August 29, 1975 plaintiffs' application for a temporary restraining order (requiring that they be allowed to register and to attend courses at DMC) was signed by Judge Bramwell in his capacity as Miscellaneous Judge. Plaintiffs are now before this court seeking a preliminary injunction which would embody the same elements as the TRO. Defendants oppose the application for a preliminary injunction, and further seek an order dismissing the complaint for lack of subject matter jurisdiction, and failure to state a claim.

#### Jurisdiction

Plaintiffs invoke the jurisdiction of this court pursuant to 28 U.S.C. § 13<sup>43</sup>. Defendants have moved for a dismissal under Rule 12(b) (1), Fed.R.Civ.P. for lack of

subject matter jurisdiction, but present no arguments on this ground. 28 U.S.C. § 1343(3) provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

This court has jurisdiction, under this section, if the actions of the college rise to the level of state action, Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) but lacks jurisdiction if sufficient evidence of state action is not presented. Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); compare Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).

Defendants have not controverted the jurisdictional facts pleaded in the complaint. Therefore, the court must assume the truth of those assertions for purposes of this motion. In paragraph 28 of the complaint, plaintiffs allege that the defendants are "administrators of an institution

(DMC) which is part of the government of the State of New York." Furthermore the first defendant is named both individually and in her capacity as Chairman of the Board of Trustees of the State University of New York. These are sufficient allegations of state action: See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). When an individual acts pursuant to authority derived from the state, his action rises to the level of state action. Griffin v. Maryland, 378 U.S. 130, 135 (1964).

It has been suggested that the particularly offensive nature of racial discrimination may allow the judiciary to find state action, when the state's involvement would not be sufficient to constitute state action if other rights were involved. Jackson v. Statler Foundation, 496 F.2d 623, 628 (2d Cir. 1974), cert. denied Grafton v. Brooklyn Law School, at 1142.

In any event this court has jurisdiction of  
this cause of action under 28 U.S.C. § 1331<sup>1</sup> and 42 U.S.C.  
§ 1981<sup>2</sup> since the relationship between plaintiffs and defendants is essentially contractual. See McGary v. Runyon, 515 F.2d 1082 (4th Cir. 1975) (decided en banc).

The uncontroverted jurisdictional allegations of the complaint are sufficient to meet the threshold requirements for a finding of jurisdiction; therefore the motion to dismiss for lack of subject matter jurisdiction is denied. See United States v. Guest, 383 U.S. 745, 756 (1966).

Do pleadings state a claim upon which relief can be based?

Defendants also move for a dismissal of the complaint for failure to "state a cause of action." Although no specific rule is named, the motion clearly is intended to be a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

Defendants have submitted an affidavit in support of their motion, which, if this court were to refer to it, would require consideration of the motion procedurally as one for summary judgment as provided for in Rule 56. Among its other requirements, Rule 56 mandates at least 10 days notice to the other party. Defendants did not meet this notice requirement. This court, however, is not required to examine or rely on the affidavit submitted by defendants in

support of their motion. The court may choose not to utilize the affidavit for purposes of a 12(b)(6) motion, in which case the issue of whether a claim for relief has been stated shall be determined on the basis of the pleadings alone, and the 10 day notice requirement in Fed.R.Civ.P. 56 is not mandated. See 2A J. Moore, Federal Practice ¶ 12.09 at 2300 (2d ed. 1975). After consideration of the two alternatives this court shall ignore the affidavit and treat the motion as a 12(b)(6) motion, rather than treating it as a motion for summary judgment and dismissing for lack of adequate notice.

Plaintiffs have alleged causes of action under the 14th Amendment of the Constitution and under 42 U.S.C. §§ 1981, 1983 and 2000-d. Since no allegation of federal funding appears in the complaint, the complaint fails to state a cause of action under 42 U.S.C. § 2000-d. The complaint does, however, state a cause of action under 42 U.S.C. §§ 1981, 1983 and the 14th Amendment to the Constitution.

A civil rights complaint should not be dismissed "unless it appears to a certainty that plaintiffs are

entitled to no relief under any state of facts which could be proved in support of their claims." Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir. 1970), cert. denied, 400 U.S. 853 (1970). It is well settled that courts will generally not interfere in the internal affairs of a college or university; the school and its faculty are far more qualified to develop academic standards and to evaluate the academic progress made by students. However, if the plaintiff can prove the faculty's evaluation was arbitrary, capricious or motivated by racial prejudice the court can intervene. Connelly v. University of Vermont, 244 F. Supp. 156 (D. Vt. 1965); Brookins v. Bonnell, 362 F. Supp. 379 (E.D. Pa. 1973).

In the instant case, plaintiffs have alleged that the procedures adopted by DMC were "racist." Specifically, plaintiffs charge that the decelerated program was a "conduit through which most black students . . . [were] shunted from the rolls," that leaves of absence were "routinely" granted to white students, but arbitrarily denied to blacks, that white students had two opportunities to take a make-up exam while black students had only one opportunity to do so, that black students received failing grades while white

students with the same test scores received passing grades, and that in general "defendants administer[ed] a program which openly discriminated against the plaintiffs by applying stricter academic and procedural standards to blacks than to whites similarly situated." These allegations, if proven, would constitute racial discrimination of an arbitrary and capricious nature so as to deprive the plaintiffs of equal protection of the law.

Since this action is still at the pleading stage, for purposes of a 12(b)(6) motion we accept as true all of the allegations in plaintiffs' complaint. Escalera v. New York City Housing Authority, 425 F.2d at 857. Because enough facts are alleged to constitute a violation of the applicable statutes, the motion to dismiss for failure to state a claim is denied.

#### Preliminary Injunction

Normally, a hearing is appropriate for determination of the factual issues underlying a request for a preliminary injunction. Since the parties were not prepared for a factual hearing, however, this court may nevertheless determine whether the temporary restraining order should be

continued or dissolved pending such hearing. Granny Goose Foods Inc. v Brotherhood of Teamsters, 415 U.S. 423, 441 (1974). The United States Court of Appeals for the Second Circuit has adopted a dual test for determining whether a preliminary injunction is proper: (1) clear likelihood of success on the law and the facts then available and possible irreparable injury, or (2) sufficiently serious questions on the merits making them fair ground for litigation and a balance of the equities tipping decidedly in favor of preliminary relief. Columbia Pictures Industries v. American Broadcasting Companies, 501 F.2d 894 (2d Cir. 1974). These criteria are equally applicable to temporary restraining order determinations. See Gerber v. Seamans, 332 F. Supp. 1187 (S.D.N.Y. 1971).

Although no reliance was placed on defendants' affidavits in deciding the 12 (b) (6) motion, it is appropriate to utilize those affidavits in determining whether the temporary restraining order should be continued. The motion for a preliminary injunction was brought on by plaintiffs; defendants' affidavits were submitted in opposition to that motion. Therefore, utilization of the affidavits for injunctive relief purposes presents none of the notice

problems which were present in the 12(b)(6) motion.

Proof of racial discrimination in an academic setting is made difficult by the fact that each student must be considered as an individual - students with two failures should perhaps be treated differently than students with three failures; students with lower failing grades may perhaps be treated differently than those with higher failing grades. Moreover, the fact that two students, ostensibly with the same record, are treated differently may very well be a result of differing evaluation of the students' potentials rather than racial discrimination. Each student's progress must be evaluated in terms of his background, and the judgment of the school will normally be controlling on these matters. The student bears the burden of showing that his dismissal was for reasons other than academic failure, Connelly v. University of Vermont, 244 F. Supp. at 160, and "only the most compelling evidence of arbitrary or capricious conduct would warrant our interference with the performance evaluation (grades) of a dismissed student made by his teachers." Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975).

There can be no question that plaintiffs' performances in medical school were dismal at best. Moreover, the allegations of racial discrimination are effectively disputed by the affidavit of Dr. Jerome Parnell, Associate Dean of the medical school. Dr. Parnell states that the decelerated program was an attempt to "salvage", rather than to destroy, the medical careers of failing students. His affidavit points out that all failing students were placed in the program without regard to color, that no make-up exams for first-term failing students were given in January, that leaves of absence were never given because of poor academic progress, and that tests were graded by computer, thus insuring that no student, either black or white, could pass a test with a lower grade than the established passing grade.

In an affidavit based on examination of the records of Downstate Medical School, the Assistant Attorney General of New York has attested to the fact that only four of twenty blacks were decelerated in 1972-1973 and four of thirteen blacks were placed in the decelerated program in 1973-1974. The affidavit clearly disputes plaintiffs' charge that the decelerated program was "the

conduit through which most black students . . . [were] shunted from the rolls." In view of the foregoing, this court must conclude on both the law and the facts that plaintiffs have failed to show clear likelihood of success.

Furthermore, if the temporary restraining order is dissolved, plaintiffs will not suffer irreparable injury. At worst, they will be subjected to a short delay in their studies. Any attempt to characterize such a delay as irreparably injurious is unpersuasive, especially in view of plaintiffs' repeated efforts in the past to obtain leaves of absence from their studies.

The court cannot agree that the conclusory allegations in plaintiffs' complaint, when compared with the affidavits of Dr. Parnell and the Assistant Attorney General, raise sufficiently serious questions on the merits to make them fair ground for litigation. Nor do the equities tip decidedly in plaintiffs' favor. DMC is similar to other medical schools in that its facilities are extremely limited, and are utilized to capacity. It would be injurious at this time to the school to require it to maintain on its rolls two students who have done as poorly

as have the plaintiffs, especially when the conclusory allegations of the complaint are disputed by defendants' affidavit. The only injury plaintiffs will suffer if the temporary restraining order is dissolved, should they eventually succeed on the merits, or in their application for a preliminary injunction, is a short delay in their <sup>3</sup> studies./ If, however, the temporary restraining order is continued, but plaintiffs do not succeed on the merits or in their application for a preliminary injunction (a result which appears at least as likely as not) they will suffer damage as a result of the extra expenditure of time and money pursuing a course of studies which would then be closed to them. Thus, the balance of the hardships does not tip decidedly in plaintiffs' favor. See Gulf & Western Industries Inc. v. Great Atlantic & Pacific Tea Co. 476 F.2d 687, 692 (2d Cir. 1973).

Plaintiffs in their brief admit that

When the new physician takes the Hippocratic Oath, he places upon his shoulders a mantle of awesome responsibility. Charged with the burden of preserving life, the physician should be a person of great intelligence, probity, decisiveness, and compassion.

The work of the physician must not be entrusted to the mediocre or ordinary, but to the best and brightest in the community, and the physician's training must be totally challenging and thorough. No poorly trained or ordinary person should ever receive legal sanction to use the scalpel, for the loss of faith engendered by malpractice not only harms physicians, but weakens the trust of the people in their healers. A medical school must, of course, maintain the highest standards. Any adulteration of performance requirements would eventually cheapen the profession of medicine by reducing the value of the physician to society.

Courts must exercise great caution in interfering with a medical school in its evaluation of the competence of students. Based on the record before it, this court cannot continue a temporary restraining order which requires plaintiffs' reinstatement; accordingly, the restraining order is dissolved. Defendants' 12(b)(6) motion is granted in part and denied in part without prejudice to resubmit such motion along with supporting affidavits upon proper notice. Plaintiffs are given leave to amend their complaint. Both parties are directed to call my chambers for the purpose of scheduling a consolidated trial and hearing on the factual issues underlying plaintiffs' complaint. So ordered.

W.H. Miller U.S. D. J.

FOOTNOTES

1/

28 U.S.C. § 1343(4) provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

2/

42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3/

It is appropriate to note at this point that even if the plaintiffs do eventually succeed in proving racial discrimination this court's power to order their reinstatement is open to question. Compare Connelly v. University of Vermont, supra at 161 (in a due process setting, only remedy would be to order that the university give plaintiff a fair and impartial hearing on his dismissal order) with Greenhill v. Bailey, supra (reinstatement could be ordered). It is not necessary to decide at this time which course of action would be more appropriate in an equal protection setting.

EASTERN DISTRICT OF NEW YORK

-----X

WALTER D. CROMER and ALBERT GRAHAM, :

Plaintiffs, :

-against-

MRS. MAURICE T. MOORE, individually and  
as CHAIRMAN OF THE BOARD OF TRUSTEES OF  
THE STATE UNIVERSITY OF NEW YORK,  
et al.,

NOTICE OF MOTION  
TO DISMISS  
AMENDED COMPLAINT

: 75 Civ. 1418

Defendants.

-----X

PLEASE TAKE NOTICE that upon the annexed affidavit  
of A. SETH GREENWALD, sworn to April 19, 1976 and all the  
prior proceedings the undersigned will move this Court, 2nd  
floor, 225 Cadman Plaza East, Brooklyn, New York on the  
3rd day of May, 1976 at 10:00 A.M. or as soon thereafter as  
counsel may be heard for an order dismissing the amended  
complaint pursuant to P.R.C. Proc. 12(b)(1) and (6) and for  
failure to state a cause of action and lack of subject matter  
jurisdiction and for such other and further relief as may be  
just and proper.

Dated: New York, New York  
April 19, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
Attorney for Defendants  
By:

A. SETH GREENWALD  
Assistant Attorney General  
Office and P.O. Address  
Two World Trade Center  
New York, New York 10047  
Tel: 488-3396

TO: GREENE AND ALTER  
Attorney for Plaintiffs  
32 Court Street

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

WALTER D. CROMER and ALBERT GRAHAM, :  
Plaintiffs, :  
-against- :  
MRS. MAURICE T. MOORE, individually and :  
as CHAIRMAN OF THE BOARD OF TRUSTEES OF :  
THE STATE UNIVERSITY OF NEW YORK, :  
et al., :  
Defendants.  
-----X

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK )

A. SETH GREENWALD, being duly sworn, deposes and  
says:

I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for defendants and make this affidavit in support of the motion to dismiss the amended complaint.

I

Initially this Court by memorandum and order (November 5, 1975) denied defendants' motion to dismiss. This was based on the premise that if the cancellation of plaintiffs student registration was in bad faith or racially motivated, the courts would intervene, but not to substitute its views as to academic standards for the university. Cf. Connelly v. University of Vermont, 244 F. Supp. 156, 161 (D. Vt. 1965). However, by the amended complaint the plaintiffs have abandoned any claim of racial discrimination.

The amended complaint appears to present a claim of denial of "substantive" and procedural due process. To this extent it appears to be based on the decision of the Eighth Circuit in Greenhill v. Bailey, 519 F. 2d 5, 10 (8th Cir. 1975). On this, and other reasons, it is submitted that the complaint is insufficient as a matter of law and should be dismissed.

To put the academic requirements of the Downstate Medical School in proper perspective, below is quoted the "Academic Regulations" (and Professional Requirements) of the School as contained at p. 111 of the 1973-74 Bulletin (a relevant time period):

#### "Student Evaluation

It is a responsibility of the faculty and administration of the College of Medicine to examine and evaluate students in order to graduate qualified, competent physicians. Examination and evaluation procedures are designed to be educationally beneficial to the student by making him aware of his strengths and weaknesses and by enabling the faculty to evaluate their teaching and the curriculum.

The final evaluation of a student's performance is reported as satisfactory, unsatisfactory, or, where academic performance is outstanding, as honors. An evaluation of incomplete is reported for students who for special reasons are unable to complete required segments of the course in the time allotted.

#### "Scholastic Status and Promotion

Promotion from one class to another is contingent upon the satisfactory completion of all the required work of each year.\*

It is the duty of a faculty committee representing all the departments involved in the student's instruction during a particular academic year to review the status of each student periodically and to make recommendations to the faculty concerning promotion, removal of academic deficiencies, or cancellation of registration."

\*Plaintiffs, amended complaint, ¶ "12", fails to cite this condition, before reciting the following paragraph. Obviously satisfactory completion of each year's work is a condition of continuing in school. The standard is clear.

Furthermore the requirement that promotion depends on satisfactory completion of the prior year's works, especially as to the first year, is grounded firmly in the M.D. program at Downstate. As stated in the 1973-74 Bulletin (when Cromer started and Graham was in school), p. 32 (in part):

"At Downstate, it is recognized that the curriculum must be dynamic and subject to modifications to include advances of knowledge and to suit the changing needs of society. It is also recognized that medicine must have a firm scientific base upon which a humanistic practice can be built. Towards these ends, the curriculum at Downstate, like that at many American medical schools, has been under intensive review within recent years, and substantive revisions have been introduced within the past year. At present, the curriculum is 36 months long, distributed over a four-year period. The primary objective of the courses of instruction offered during the first year is a thorough understanding of human biology. During the second year, disease processes that alter normal human biology are introduced in the early part of the year, and clinical skills in the latter part. The third year is spent entirely in clinical clerkships, and the fourth year is elective, allowing students pursue in depth their chosen areas of interest in medicine.

"The traditional courses offered during the first two years have been modified to achieve temporal correlation of the subject material in different courses. In addition, in some areas where an interdisciplinary approach is particularly suitable, new courses, taught by faculty from several different departments, have been organized. During his or her preparation in the scientific basis of medicine, the student is also introduced to some human aspects of medical care. An unusual feature of the curriculum at Downstate is that clinical correlation is rigorous when the student is properly prepared for a thorough appreciation of disease states and human illnesses. Clinical correlation discussions are included in courses in the

basic sciences during the first two years, but a unique approach, to be instituted in the 1973-74 academic year, is the introduction of a six-week course called Pathophysiology Correlation Sequences at the end of the second year. During these sequences, the scientific basis of medicine is reinforced and amplified within a generally clinical context. These correlation sequences also serve as an introduction to clinical clerkships in the third year. Such a curriculum embodies the best features of traditional preparation in the basic scientific disciplines and the more modern approach to integration of a vast amount of information in a clinically relevant framework."

Plaintiffs' contention that they could not be cancelled after repeated failures to complete the first year flies in the face of the objectives of the medical education program.

It is submitted that the standards are clear and reasonable. In the accompanying memorandum of law it will be shown that plaintiffs have no property right in continued enrollment and, even if they have such a right, they were provided with all possible or necessary due process.

In the later regard, it should be emphasized, and it cannot be controverted, that plaintiffs never demanded any hearing, or were given same, when requested.

Thus plaintiff Cromer did appeal his cancellation of registration by the Promotions Committee (the members of which are not defendants) and met with defendants Greene and Laster on July 25 and 31, 1975. Mr. Cromer presented his case and was given the rationale for cancellation which was upheld. He was

informed of his right to appeal to the President, defendant Plimpton. See original complaint, paragraph "33".

Similarly plaintiff Graham followed this procedure in the summer of 1974 when he was allowed to continue in school for another year by the Dean. If this procedure was not followed in 1975, it was not because Graham was unaware of his right to appeal and a hearing. See original complaint, paragraph "38".\*

WHEREFORE, your deponent respectfully requests the complaint be dismissed.

A. SETH GREENWALD

Sworn to before me this  
19th day of April, 1976

Assistant Attorney General  
of the State of New York

\*These appeals were personal and not necessarily in writing.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

WALTER D. CROMER and ALBERT GRAHAM,

Plaintiffs,

-against-

ORDER OF DISMISSAL

75 Civ. 1418

MRS. MAURICE T. MOORE, individually and  
as CHAIRMAN OF THE BOARD OF TRUSTEES  
OF THE STATE UNIVERSITY OF NEW YORK,  
et al.,

Defendants.

-----X

Plaintiffs having filed an amended complaint in this  
action, and defendants having moved to dismiss the amended  
complaint, by notice of motion dated April 19, 1976, and all  
sides having been heard,

IT is, on this 10th day of May, 1976

ORDERED, that this action is hereby dismissed with  
prejudice and without costs.

Dated: Brooklyn, New York  
May 10, 1976

---

HON. MARK A. COSTANTINO  
United States District Judge

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

WALTER D. CROMER AND ALBERT GRAHAM

CIVIL ACTION NO.

Plaintiffs,

-against-

MRS. MAURICE T. MOORE, et al.,

Defendants.

-----x

COMPLAINT

I

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Secs. 1334. This is an action in equity authorized by 42 U.S.C. Secs. 1983, ~~et seq.~~ The rights, privileges and immunities sought to be secured in this action are guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and by 42 U.S.C. Secs. 1981, 2000-d.

II

This is a proceeding for a preliminary and permanent injunction enjoining defendants from continuing to apply separate and discriminatory academic criteria to black students at Downstate Medical Center and to restore plaintiffs to the rolls of Downstate Medical Center as regular students outside the decelerated program and subject to removal or retention by the same academic criteria as white students.

III

STATEMENT OF FACTS

1. Plaintiffs Walter D. Cromer and Albert Graham are black men

resident in this Judicial District, who were formerly registered as students at Downstate Medical Center (hereafter referred to as DMC), allegedly for academic reasons. Plaintiff Walter D. Cromer's registration was cancelled in June, 1975. Plaintiff Albert Graham's registration was cancelled in June, 1975.

2. Plaintiffs alleges that the defendants, who are officials of the Downstate Medical Center and/or of the State University of New York have adopted racist academic and procedural standards for determining the progress of medical students at DMC, and have applied these wrongful standards in violation of the plaintiffs' constitutional and statutory rights.

3. The specific racist academic and procedural standards which violated the constitutional and statutory rights of the plaintiffs concern the PROMOTIONS COMMITTEE and the DECELERATED PROGRAM of DMC.

4. Although the Bulletin of DMC for 1975-1976 makes no actual mention of a decelerated program or a Promotions Committee, the Bulletin, on page 21, apparently states the nucleus of the committee:

"It is the duty of a Faculty committee representing all the departments involved in the student's instruction during a particular academic year to review the status of each student periodically and to make recommendations to the faculty concerning promotion, removal of academic deficiencies, cancellation of registration."

5. The Promotions Committee meets at the end of the academic year and decides on the academic futures of students with failing grades still outstanding on their records.

6. Defendants supervise, and/or are members of the Promotions Committee and/or meet with the Promotions Committee and/or select its members and/or are voting members of the Promotions Committee.

7. The Promotions Committee has, since January, 1973, placed selected students with academic problems in a special program

called the Decelerated Program.

8. The Decelerated Program ~~is~~<sup>was</sup> allegedly a part-time program of medical studies designed to lessen the course load for the academically-troubled student, lengthen his time at DMC, and thereby help the student to have the opportunity to complete satisfactory preparation for the medical profession.

9. The Decelerated Program ~~is~~<sup>was</sup>, in fact, and ad hoc creation of the defendants' Promotions Committee which ~~work~~<sup>ed</sup> to prevent the student from being graduated from DMC.

10. The criteria for placing a student in the Decelerated Program and the criteria for returning a student from that program to a regular course of study ~~are~~<sup>was</sup> not publicized at DMC and the methods of decision applied by the Promotions Committee in such cases ~~are~~<sup>was</sup> secret.

11. The Decelerated Program ~~is~~<sup>was</sup>, in fact, the program into which most black students, including the plaintiffs at bar, have been shunted and it ~~is~~<sup>was</sup> the conduit through which most black students ~~were~~<sup>are</sup> dropped from the rolls of DMC. The illegal academic strictures and the psychological pressure brought to bear on the plaintiffs at bar in the Decelerated Program ~~were~~<sup>are</sup> directly responsible for their being dropped from the rolls.

12. Only one token white student ~~has been~~<sup>was</sup> placed by the Promotions Committee in the Decelerated Program in spite of the fact that many white students have had similar or identical problems to the plaintiffs at bar. ~~This white student~~<sup>Spec'd treatment</sup>. This white student received

13. In dealing with white students who have or have had similar academic problems to the plaintiffs, the Promotions Committee ~~grants~~<sup>leaves</sup> routinely leaves to white students so they may solve their problems and return to DMC as regularly registered students outside the

14. The Promotions Committee routinely refuses academic leaves to black students who have academic problems and gives them no alternative except entry into the decelerated program .

15. The Promotions Committee does not routinely require white students in academic difficulties to <sup>agree to</sup> sign stipulations in which they <sup>accept</sup> agree to that a single failing grade in the future means immediate expulsion from DMC.

16. White students may fail a course twice before having their registration cancelled. <sup>or three times</sup>

17. The Promotions Committee permits white students who take incompletes by missing a final examination to take a makeup examination within a few days.

18. The Promotions Committee ~~does~~ <sup>did</sup> not permit black students in the decelerated program who take incompletes to take makeup examinations within a few days.

19. Both black and white students may take make up examinations at the end of the academic year to remove any outstanding failures and incompletes from their records.

20. Consequently, black students in the decelerated program who have a failure or an incomplete have only one opportunity to take a make up examination. White students have two opportunities.

21. In addition, whites who fail the regular make up tests in the winter or spring get another chance to pass in June. A black decelerated student who fails the single make up exam in June will be dropped.

22. Consequently, white students may, by the beginning of June, have

decelerated program face the possible cancellation of their registration by the Promotions Committee for outstanding failures.

23. Since the Promotions Committee gives white students two chances to pass examinations and black decelerated students only one chance, the pressures, both academic and psychological, are enormous. Since they are not permitted to take an immediate make up, black students may be forced to study for several extra final examinations at the end of the academic year. Instead of decreasing the academic and psychological pressure on minority students, the decelerated program is a negative element which drives blacks out of DMC.

24. Blacks segregated into the decelerated program are regarded with disdain by most regular students and by most faculty. They are subject to classroom humor, pity, and other indignities. Even their pictures in the class yearbook appear on a special page separate from the regular students.

25. Most of the examinations have two parts: practical and written. Each part is worth fifty percent of the total grade. If a student does exceptionally well on one part but his total score is failing, the student may pass. Black students with high scores on one part and low scores on another part consistently receive failing grades while whites who are identically situated routinely pass courses.

26. The defendants administer a program which openly discriminated against the plaintiffs at bar by applying stricter academic and procedural standards to blacks than to whites similarly situated.

The defendants administer a program which created an intense psychological pressure upon the plaintiffs, an academic sword of Damocles which white students at DMC do not face. .

27. The actual effect of the decelerated program is not to assist black students in coping with the severe demands of medical studies. On the contrary, entry into the program is advance notice of the student's impending cancellation of registration.

28. The defendants, administrators of an institution which is part of the government of the State of New York, have, under color of law, denied the plaintiffs at bar the right to equal protection under law which is guaranteed to them by the Constitution of the United States.

29. Plaintiff CROMER, who entered DMC in September, 1973, was placed in the decelerated program in January, 1974 due to poor academic performance. CROMER, who supports four children and is now thirty-eight years old, requested that defendant PARRELL grant him a leave of absence so he could solve his family problems. CROMER indicated that he did not wish to enter the decelerated program. Defendant PARRELL responded that CROMER had no alternative but to begin the decelerated program or leave the school. Whites in identical situations received leaves at the suggestion of defendant PARRELL and were not forced into the decelerated program. [Karl Latner]

30. Defendant PARRELL, in the presence of defendant GREENE, informed CROMER that he would also have to accept a stipulation that he if he were to fail another examination, even in a new course, he would have to accept cancellation of registration. Whites in identical or similar situations never <sup>had to agree to</sup> ~~have to sign~~ such stipulations.

31. Plaintiff CROMER was denied the opportunity to take a regularly scheduled make up examination in December, 1974. CROMER had missed the finals in Biochemistry and Gross Anatomy. Unlike the other white students who had missed the regular examination, CROMER was

forced to wait until the end of the academic year to take the make up examinations.

32. After failing the neuroscience examination in June, 1975, CROMER received news that his registration had been cancelled and that he would not be permitted to take a make up test.

33. CROMER appealed to defendants LASTER and PLIMPTON but all appeals were denied.

34. Plaintiff GRAHAM entered DMC in September, 1972. He failed two courses his first semester. Although GRAHAM'S failing grades were better than those of some whites in the same courses, GRAHAM failed while the whites received passing grades.

35. Plaintiff GRAHAM, in January, 1973, unlike whites similarly situated, was denied the right to take regularly scheduled examinations to remove failures and was compelled to wait until June, 1974 for the make up tests.

36. Plaintiff GRAHAM, in January, 1973, unlike whites similarly situated, was not offered a leave of absence, but was shunted into the decelerated program and compelled to repeat several courses.

37. Plaintiff GRAHAM failed the neuroscience final in June, 1974. At the time, both of his parents, who are his sole support, were in the hospital awaiting surgery. Consequently, GRAHAM, who had been under great strain during the regular examination period, learned that the surgery was to take place during the make up examination. He appealed to defendant PARSELL to give him a two day postponement until the post-operative results would be known. PARSELL refused the

request and GRAHAM took the make up and failed. His registration was cancelled in June, 1974.

38. GRAHAM immediately appealed the decision to cancel his registration. The Promotions Committee determined that he could return to school in September, 1974 if he (A) agreed to undergo a thorough medical and psychiatric examination and (B) agreed to take physiology and neuroscience in the spring of 1975.

39. The plaintiff initially refused to agree to these conditions. However, he later consented to (a) and underwent the examinations. Although GRAHAM has requested that he be shown the medical and psychiatric report, both have never been shown to him.

40. Even though GRAHAM had agreed to condition (b), he audited, on his own time, the regular sequence of courses offered in September, 1974. In December, he took the finals in the courses he had audited and passed.

41. As a consequence of this violation of condition (b), defendant LASTER informed the plaintiff that his registration was cancelled as of June, 1974.

#### IV

Plaintiffs have suffered irreparable injury from the wrongful acts of the defendants. Plaintiffs have no other adequate remedy at law to redress the grievances herein set forth than this suit for injunctive relief.

As a consequence of their aforesaid acts, defendants have violated 42 U.S.C. Secs. 1981, 1983, and 2000-d.

WHEREFORE, plaintiffs pray: (a) That after a full hearing, this Court declare that the defendants have been carrying on

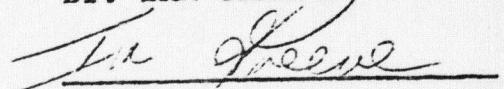
policies at DMC which discriminate against black students and that the defendants be prohibited from perpetuating the racist policies of the decelerated program and the Promotions Committee and/or the academic departments of DMC who send representatives to that Promotions Committee.

(b) That after granting a temporary restraining order restoring plaintiffs to the rolls of DMC, this Court declare that plaintiffs were wrongfully dropped from the rolls by the defendants through the Promotions Committee and that plaintiffs have their registration restored subject to, in all future situations, the same academic criteria which defendants apply to white students.

(c) That the Court allow plaintiffs herein their costs herein including reasonable attorneys' fees and other relief as may appear to the Court equitable and just.

IRA GREENE and BERNARD M. ALTER, Attorneys for Plaintiffs WALTER D. CROME and ALBERT GRAHAM  
32 Court Street  
Brooklyn, New York 11201  
(212) 237-0880

BY: IRA GREENE



STATE OF NEW YORK) ss. :  
COUNTY OF KINGS )

WALTER D. CROMER, being duly sworn, deposes and says. I am a plaintiff in this proceeding. I have read the foregoing complaint and know the contents thereof. All the allegations are true to my own knowledge, except the matters stated to be on information and belief, and as to those matters I believe them to be true.

Walter D. Cromer  
WALTER D. CROMER

Sworn to before me this day  
27 August, 1975

Irvin Greene

IRVING GREENE  
Notary Public, State of New York  
No. 41-4601260  
Qualified in Queens County  
Commission Expires March 30, 1976

STATE OF NEW YORK) ss. :  
COUNTY OF KINGS: )

ALBERT GRAHAM, being duly sworn, deposes and says: I am a plaintiff in this proceeding. I have read the foregoing complaint and know the contents thereof. All the allegations are true to my own knowledge, except the matters stated to be on information and belief, and as to those matters I believe them to be true.

*Albert Graham*

ALBERT GRAHAM

Sworn to before me this day  
27<sup>th</sup> of August, 1975

*Ir. Greene*

IR. GREENE  
Notary Public, State of New York  
No. 41-4601233  
Qualified in Queens County, 76  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WALTER D. CROMER and ALBERT GRAHAM,

75 Civ. 1418

Plaintiffs,

-against-

AMENDED COMPLAINT

MRS. MAURICE T. MOORE, et al.,

Defendants.

---

Plaintiffs, complaining of the defendants, by their attorneys, Alter & Greene, allege the following:

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1334. This is an action in equity authorized by 42 U.S.C. §1983. The rights, privileges, and immunities sought to be secured in this action are guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and by 42 U.S.C. §1981 and §1988.

PARTIES

1. Plaintiff WALTER D. CROMER resides at 310 Clinton Avenue, Brooklyn, New York and attended Downstate Medical Center College of Medicine from September, 1973 until June, 1975 when his registration was cancelled.

2. ALBERT GRAHAM resides at 908 Linden Boulevard, Brooklyn, New York and attended Downstate Medical Center College of Medicine from September, 1972 until June, 1975 when his registration was cancelled.

3. Defendant MRS. MAURICE T. MOORE of 1000 Park Avenue, New York City is Chairman of the Board of Trustees of the State University of New York.

4. Defendant C. WESLEY MEYFROTT, of 66 Remsen Street, Brooklyn, New York, is Chairman of the Council for Downstate Medical Center.

5. Defendant CALVIN H. PLIMPTON, of 4600 Palisade Avenue, Bronx, New York is President of Downstate Medical Center.

6. Defendant LEONARD LASTER, of 50 Larchmont Avenue, Larchmont, New York, is Dean of Downstate Medical Center College of Medicine and Vice-President for Academic and Clinical Affairs of Downstate Medical Center.

7. Defendant JEROME P. PARNELL, of 1239 Village Court, Baldwin, New York, is Associate Dean of Downstate Medical Center College of Medicine.

8. Defendant CHARLES R. GREENE, of 178 Midwood Street, Brooklyn, New York, is Assistant Dean of Downstate Medical Center College of Medicine.

#### PRELIMINARY STATEMENT

9. WALTER D. CROMER and ALBERT GRAHAM are black men, both residents in this judicial district, who were dropped as students at Downstate Medical Center College of Medicine, allegedly for academic reasons, in June, 1975.

10. The plaintiffs charge that the defendants, who are state officials in charge of Downstate Medical Center, violated plaintiffs' substantive and procedural due process rights by placing the question of plaintiffs' academic fitness before the Promotions Committee of the College of Medicine, the group that cancelled plaintiffs' medical registration.

11. Although the Promotions Committee of Downstate Medical Center is not mentioned by name in the 1975-76 Downstate Medical Center Bulletin, the nucleus of the Committee appears on page 21:

"It is the duty of a faculty committee representing all the departments involved in the student's instruction during a particular academic year to review the status of each student periodically and to make recommendations to the faculty concerning promotion, removal of academic deficiencies, cancellation of registration."

12. Plaintiffs allege that the Promotions Committee operated on a purely ad hoc basis without having any academic objective standards to determine promotion or cancellations without giving students notice or an opportunity to be heard, and without maintaining a record of its proceedings and votes.

12. That the defendants, officials in charge of Downstate Medical Center and/or the Medical College of Downstate Medical Center, a branch of the State University of New York and the Department of Education of the State of New York, denied the plaintiffs due process of law by allowing the Promotions Committee of Downstate Medical Center, the Medical College group responsible for maintenance of academic standards, to consider and to determine the question of plaintiffs' fitness to continue in medical school without permitting the plaintiffs to present their side personally or by counsel before the Committee.

13. That the defendants, who are public officials employed by the State, also violated plaintiffs' substantive due process rights by permitting the Promotions Committee to consider and determine the question of plaintiffs' fitness to continue in medical school without the Promotions Committee lacking any objective standard for examining academic fitness, failed to keep records of the composition of individual votes and, in fact, applied a purely subjective standard in accepting plaintiffs' registration.

14. That the defendants violated plaintiffs' substantive due process rights by supplying false and inaccurate evidence to the Promotions Committee and that these statements were intended to be to the disadvantage of the plaintiffs by emphasizing their academic weaknesses.

16. That the decision to dismiss plaintiffs CROMER and GRAHAM from the College of Medicine was made in bad faith and in an arbitrary and capricious manner.

17. Plaintiffs have suffered irreparable injury from the wrongful acts of the defendants. Plaintiffs have no other adequate remedy at law to redress the grievances herein set forth than this suit for injunctive relief.

18. As a consequence of their aforesaid acts, defendants have violated 42 U.S.C. §§1983 and 1988.

WHEREFORE, plaintiffs pray that this Court order:

a. A full and impartial hearing be held by the State University of New York to determine if the plaintiffs should have been dismissed from the Medical College of Downstate Medical Center;

b. Upon a finding that said dismissal was wrongful, that plaintiffs be restored to the rolls of the Medical College of Downstate Medical Center as regular matriculated students; and

c. That plaintiffs be allowed their costs herein including reasonable attorneys' fees and other relief as may appear to this Court equitable and just.

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Brooklyn, New York 11201  
(212) 237-0880  
Attorneys for Plaintiffs

By \_\_\_\_\_  
IRAH GREENE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

WALTER D. CROMER and ALBERT GRAHAM,  
Plaintiffs,  
-against-

ORDER TO SHOW CAUSE

CIVIL ACTION NUMBER  
75C/1418

MRS. MAURICE T. MOORE, et al.,  
Defendants.

-----x

On reading the affidavits of WALTER D. CROMER, and IRA GREENE,  
duly sworn to the 31<sup>st</sup> day of October, 1975, and upon all proceedings had  
herein it is

ORDERED, that JEROME PARNELL be and appear in his own proper person  
before this Court at 225 Cadman Plaza East on the \_\_\_\_\_ day of \_\_\_\_\_,  
1975 at \_\_\_\_ M. of said day, or as soon thereafter as counsel can be  
heard, to show cause, if any he has, why he should not be punished pur-  
suant to F.R.C.P. 70 for contempt of court for violating and disobeying  
the order of this Court entered in the office of the Clerk thereof at  
225 Cadman Plaza East on the 3rd day of September, 1975 by refusing to  
register the plaintiff, WALTER D. CROMER, as a student at the Downstate  
Medical Center.

Service of this order may be made upon the defendant JEROME PARNELL  
by servicing a copy thereof and a copy of the accompanying affidavit upon  
JEROME PARNELL personally or by personal service upon the office of the  
Attorney-General of the State of New York, attorney for the defendants

in the above-entitled action.

Witness my hand at Chamber this \_\_\_\_\_ day of \_\_\_\_\_, 1975.

Dated: Brooklyn, New York

November, 1975

Judge, United States District Court